Laborers' International Union of North America, Local 423, AFL–CIO (G.F.C., Inc., and The Altman Company) *and* Lewis J. Henderson *and* Michael A. Mayle. Cases 9–CB–8369 and 9–CB–8472

February 28, 1994

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND TRUESDALE

On July 9, 1993, Administrative Law Judge Walter H. Maloney issued the attached decision. The General Counsel filed exceptions and a supporting brief, and Charging Party Henderson filed a motion for rehearing.

The National Labor Relations Board has considered the decision and record in light of the exceptions,[1] brief, and motion and has decided to affirm the judge's rulings, findings,[2] and conclusions,[3] and to adopt the recommended Order.

1. We agree with the judge's dismissal of the complaint allegation that in February 1993 the Respondent violated Section 8(b)(1)(A) and (2) of the Act by removing Charging Parties Henderson and Mayle and other applicants from their places on the hiring hall referral list to the bottom of the list. The Respondent acted in accord with its rule that, if an applicant is absent from the hall when a regular job is called, his name will be moved to the bottom of the list.

We agree with the judge that the rule is not a per se violation of the Act; that the credited testimony establishes that the rule has been in effect, and that signs disclosing the rule have been prominently posted in the hiring hall since, at least, May 1992; and that there is no evidence that any applicant whose name was moved to the bottom of the list was in the hall on February 22, 1993, when the job was announced.

The record reveals that Henderson admitted that he has not been to the hall to seek work since January 1, 1993, and that Mayle admitted that he has maintained his practice of not arriving at the hall until 8:30 a.m. despite his admitted awareness that job referrals are almost always completed by 7:30 a.m. Thus, by their own admissions, both Henderson and Mayle were unavailable for that referral.

2. We also agree with the judge's dismissal of the complaint allegation that the Respondent violated Section 8(b)(1)(A) and (2) of the Act by its July 1992 referral of applicants to G.F.C., Inc. in a manner that delayed Henderson's actual dispatch to the job. The referral process was in two stages: the referral to take tests to screen for lead levels and drugs, and the dispatch to the job itself. There is no evidence that the referral to the tests was irregular or improper.

Dispatch to the job did not require separate work orders; written work orders had already been submitted for the tests. There is little credible evidence beyond this use of oral dispatches as to how the dispatches were actually made. Henderson, who was number 33 on the out-of-work list when the referrals for the blood tests were made, was not among the first 46 applicants who were dispatched to the job on Monday, July 13, 1992; he was dispatched a week later. There is, however, no credible evidence that Henderson (or any applicant seemingly dispatched out of order) made himself available for dispatch earlier by being present in the hall or even by telephoning the hall.[4] Conversely, on Wednesday, July 15, 1992, during the first week of the G.F.C. job, Woods did receive a phone call from Henderson inquiring about a dispatch to G.F.C. Henderson received the next available dispatch and reported to work the following Monday, July 20, 1992.

For the above reasons, we agree with the judge that the General Counsel has failed to establish that the Respondent operated its hiring hall in a discriminatory or otherwise unlawful manner. Accordingly, we agree with the judge's dismissal of these complaint allegations.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders the Respondent, Laborers' International Union of North America, Local 423, AFL–CIO, Columbus, Ohio, its officers, agents, and representatives, shall take the action set forth in the Order.

[1] No exceptions were filed to the judge's conclusion that the Respondent violated Sec. 8(b)(1)(A) of the Act by making unspecified threats of reprisal against members and applicants because they filed charges with the Board or gave testimony under the Act.

[2] The General Counsel and Charging Party Henderson have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[3] Charging Party Henderson's motion for rehearing is denied. Contrary to his assertion, his testimony was not ignored; it was discredited. We also find without merit any contentions of bias and prejudice on the part of the judge. We perceive no basis in the record or the judge's decision for finding that the judge prejudged the case, made prejudicial rulings, or demonstrated bias against Henderson.

[4] According to Respondent Business Agent Woods' credited testimony, he did not see Henderson in the hall during that period, even though Woods was there every day from 5 or 5:30 a.m. to around 10:30 a.m.

Carol L. Shore, Esq., for the General Counsel.
Lawrence M. Oberdank, Esq., of Cleveland, Ohio, for the Respondent.

DECISION

STATEMENT OF THE CASE

WALTER H. MALONEY, Administrative Law Judge. This case came on for hearing before me at Columbus, Ohio, on a consolidated unfair labor practice complaint,[1] issued by the Regional Director for Region 9, which alleges that Respondent Laborers' InternationaI Union of North America, Local 423, AFL–CIO (Union)[2] violated Section 8(b)(1)(A) and (2) of the Act. More particularly, it alleges that the Respondent threatened Lewis J. Henderson with a lawsuit and loss of his union card because he filed charges under the Act, failed to adhere to existing hiring hall procedures and thereby bypassed Henderson and others for referral to a G.F.C. job, and later failed to adhere to other existing hiring hall procedures by dropping Henderson, Charging Party Michael A. Mayle, and others to the bottom of the referral list because they did not respond when their names were called for job referrals. Respondent denies any threat to Henderson and insists that its hiring hall rules are valid and that it adhered to them at all times in making referrals. On these contentions the issues herein were drawn.[3]

FINDINGS OF FACT

I. THE UNFAIR LABOR PRACTICES ALLEGED

The Respondent is an affiliated local of the Laborers' International Union of North America, AFL–CIO. It operates a hiring hall in Columbus, Ohio, from which it refers applicants for employment to employers engaged in building and construction in eight central Ohio counties.[4] Respondent's contract with the Central Ohio Division of the Associated General Contractors covers referrals for general construction work and contains an exclusive hiring hall provision. Another contract with the Labor Relations Division of the Ohio Contractors Association covers highway and heavy contruction. This contract involves Laborers' International affiliates throughout Ohio, as well as the Respondent herein, and also contains an exclusive hiring hall provision.

The operation of the Respondent's hiring hall has been the subject of two previous Board cases and has been described in detail in those cases.[5] The hiring hall operates 5 days a week, opening about 5:30 a.m. or so and closing about 1 p.m. Jobs are normally announced beginning about 6:30 a.m. Because of the scarcity of work in recent months, the dispatcher has normally completed each day's referrals by 7:30 a.m. or 8 a.m., if not earlier. On some days there are no referrals. The dispatcher makes each day's call from an out-of-work list which is revised on a weekly basis. He starts with the name listed in first position and proceeds in numerical order until all available work has been assigned.[6] The Union requests all employers who use the hall to give the Respondent as much advance notice as possible when requesting referrals. One contract requires a 12-hour advance notice. However, contractors do not always make advance requests which are timely and the Union is obligated by contract to make referrals promptly upon request.

The Union is obligated by contract to maintain these lists and to make referrals without reference to the union membership or lack of membership of any job applicant. To maintain one's name on the list, a prospective applicant must come to the hall or call the hall every Monday morning and notify the dispatcher that he wishes to remain on the list. Failure to do so, without a valid excuse, will result in removal of a name from the list.

The Union does not make job referrals by telephone. As detailed in the litigation in *Laborers I*, in order to receive a referral an applicant must be physically present in the hall to respond to a dispatcher's call. If he is not present, the dispatcher proceeds to the next name or names in the order found on the list until an applicant awaiting referral verbally responds. An individual is entitled to refuse a call but, if the job in question is a regular job, meaning a job lasting 7 or more days, a refusal will result in the applicant's name being placed at the bottom of the list. If the job in question is less than 7 days' duration, the applicant may refuse a call and still retain his same position on the list. I credit testimony in the record, corroborated by a photograph, that the absence of an applicant from the hall when a regular job is announced has the same effect as refusing that job, i.e., if the job in question is for 7 or more days and an applicant is not present to respond when his name is called for referral, his name is then placed at the bottom of the list when a new list is prepared the following Monday.[7] I also credit record

[1] The principal docket entries in this case are as follows:

Charge filed against the Respondent in Case 9–CB–8369 by Lewis J. Henderson on November 23, 1992; complaint issued by the Regional Director, Region 9, against the Respondent on January 5, 1993; Respondent's answer filed on January 28, 1993; charge filed against the Respondent in Case 9–CB–8472 on March 12, 1993, by Michael A. Mayle and amended on April 26, 1993; complaint issued by Regional Director, Region 9, against the Respondent on April 27, 1993, and consolidated with the earlier complaint on that date; Respondent's answer filed at the hearing; hearing held in Columbus, Ohio, on May 12 and 13, 1993; briefs filed with me by the General Counsel and the Respondent on or before June 29, 1993.

[2] Respondent admits, and I find, that, through the Associated General Contractors of America, Ohio Building Chapter, Central Ohio Division, it is in contractual relationship with Glass Furnace Company, Inc. (G.F.C., Inc.), the Altman Company, and other employers, each of whom are engaged in the building and construction industry. G.F.C. and Altman, respectively, purchase annually at jobsites located in the State of Ohio directly from points and places located outside the State of Ohio goods and merchandise valued in excess of $50,000, and are employers engaged in commerce within the meaning of Sec. 2(2), (6), and (7) of the Act. The Respondent is a labor organization within the meaning of Sec. 2(6) of the Act.

[3] Certain transcript errors were noted and corrected.

[4] Some laborers who are referred to jobs have only general skills in the trade while others are classified as mason tenders and actively assist bricklayers in laying brick and block. When mason tenders are requested, the Union makes an effort to refer those who have registered as possessing those skills.

[5] *Laborers Local 423 (Great Lakes Construction)*, 298 NLRB 498 (1990) (*Laborers I*); *Laborers Local 423 (Dugan & Meyers)*, 308 NLRB 635 (1992) (*Laborers II*).

[6] Most referrals are made from the ''A'' list which contains the names of applicants with 3 or more years of experience in the industry. The contract makes provisions for B, C, and D lists for applicants with less experience and for trainees with no experience. In practice, there is only one list for these three classifications. The B-C-D list is not used unless the contractor calls for a trainee or the A list has been exhausted and unassigned jobs still remain.

[7] The Respondent explained that it inaugurated this rule to prevent applicants who were high on the register from avoiding difficult, undesirable, or onerous assignments and passing them on to lower

corroborated testimony to the effect that this rule was in effect for about 1 year dating from the hearing in this case in mid-May 1993. As a result of the Board's decision and order in *Laborers II*, the Respondent inaugurated a daily sign-in sheet in January 1993. All applicants are now required to sign this sheet each morning upon reporting for referral and to indicate on the sheet their time of arrival at the hall.[8] Failure to register each day for referral is treated as the equivalent of absence from the hall on that day.

Charging Party Lewis J. Henderson has been a member of the Respondent Local 423 for several years. In June 1992, Henderson was a candidate for union executive board and ran on an insurgent ticket headed by Charging Party Michael A. Mayle. At one time during his membership he had filed a civil action in small claims court against the Respondent. The record does not reflect the outcome of the suit. Mayle organized an insurgent slate, called Local 423 Solidarity, which ran against the incumbent leadership in the June 1992 election. He was also one of the charging parties in *Laborers II*. His insurgent slate did not prevail at the election.

In June 1992, a job of substantial size and having a duration of 2 or 3 weeks opened up at the Thomas Consumer Electronics plant at Circleville, Ohio, some 26 miles distant from the Respondent's hiring hall. (The job is sometimes referred to in the record as the RCA plant inasmuch as the plant manufactures R.C.A. television picture tubes.) G.F.C., Inc., a contractor from Toledo, Ohio, had a contract with Thomas Consumer Electronics to remove refracting brick from glass ovens and to rebuild the ovens completely. G.F.C., Inc., adhered to the Associated General Contractors contract with the Respondent which required it to utilize the Respondent's hiring hall to secure laborers. At a prejob conference which it held with representatives of the Respondent on June 25, G.F.C., Inc., informed the Respondent that the job would begin on July 13 and end on July 31. The job would operate on a two-shift basis, employees would be expected to work a 10-hour day without a coffeebreak, and they would be paid at 1-1/2 times the usual scale. G.F.C. stated that the job would require 50 laborers at its peak, that all employees referred had to be clean shaven, and that all employees would have to pass a drug screening test before being hired.[9] The latter requirement is unusual for laborers in the industry. The Respondent was able to obtain the agreement of G.F.C., Inc. to give anyone referred to the job 4 hours' showup pay just for taking the drug test.

On Monday, July 6, G.F.C., Inc. called the union hall and asked that laborers be referred to take the screening test. I credit record testimony that, on Thursday, July 9, the Respondent's dispatcher began to call the list of names on its out-of-work list in order to supply the Company's request. It called the list in order of seniority and dispatched approximately 62 men to take the test. When making referrals, it has been the Respondent's practice to furnish each applicant referred a work order which he then presents to the job superintendent in order to be hired. This practice is also required by section 4(A)(6) of its contract. In this instance, because of the unusual requirement for a screening test, the Respondent gave each applicant who was referred a work order which entitled him to go to a hospital near the jobsite and receive a test. A list of those who passed the test was then supplied to the employer. It was this list which constituted a clearance to go to work.

According to Company records, seven individuals who were referred were given only 4 hours' pay, indicating either that they did not pass the test or that they passed it but elected not to report for work. Henderson was one of the applicants who took the test and passed it. I discredit Henderson as a witness because of his argumentative demeanor, the fact that he frequently contradicted himself on the stand and testified as if he were making up his story as he went along, and because of his obvious bias against the Respondent's leadership growing out of intraunion political activities. I would not predicate any finding in a disputed matter solely upon his testimony.

The Employer's records indicate that G.F.C., Inc. hired a total of 46 laborers on Monday, July 13, 4 on July 14, and 2 on July 15. It did not hire Henderson until the following Monday, July 20, and hired one laborer the following day. Its payroll showed that it hired a total of 55 individuals who actually went to work at the Circleville job. Henderson worked 4 days or a total of 48 hours. Some 10 laborers worked a fewer number of hours than Henderson and 44 worked longer than he did.

A comparison of the out-of-work list for July 6 with the Respondent's list of those who were referred to the G.F.C. job shows that only 27 of those referred were on the ''A'' list and that the rest were not. Referred applicants had numbers on the out-of-work list ranging from 2 to 228 with large obvious gaps in between. Henderson was number 33, not 37 as he testified. I credit the testimony of Woods that, according to the practice in the hiring hall, names are called in order, as indicated above, and if there are not enough people available to answer the call, the Respondent then refers anyone present in the hall who wants to work and provides that applicant with a work order, even though the individual is not on the ''A'' list and may be either a casual employee or someone whose name is only on the ''B'' list. This is what occurred on July 9 when the G.F.C. job was called.

Woods testified that he visited the G.F.C. jobsite frequently and was told on one occasion by the G.F.C. superintendent that the Company would not need all the referred individuals at once but would require that they be dispatched over a period of time. Because the job was operating in two shifts, the Union made up a shift-preference list and asked applicants who had passed the screening test to indicate their preference. Henderson signed up for the afternoon shift, which was scheduled to begin work each day at 3:30 p.m. It is obvious from Company records that the bulk of the laborers whom it hired through the Respondent's hall reported

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ranking applicants while waiting for a more desirable job to come along. The G.F.C., Inc. job was generally regarded as an undesirable one because employees on that job were required to work for long periods of time inside hot, unventilated ovens. Jobs requiring work on scaffolds high above the ground were also regarded by some applicants as undesirable.

[8] While the Respondent is complying with the terms of the Order in *Laborers II*, as described above, it is now pursuing an appeal of the Board's decision in that case to a court of appeals.

[9] Howard Woods, the Union's long-time executive board member and field representative, testified for the Respondent. He appeared to be confused by a couple of questions and apologized for his answers when it turned out that he had misunderstood a question and had given an incorrect reply. Woods attempted to tell the truth and I credit his testimony.

for work on July 13, either on the morning or afternoon shift. Henderson was not among them.

The record is somewhat hazy about the precise time and method that laborers were informed to come to work on July 13. Woods testified that the roll was called and that employees who had passed the screening test were informed when to report. Henderson testified that he was not in the hall on the morning of July 13, and then changed his story, insisting that he was present at that time. He also testified that he visited the hall once or twice a day during the week of July 13 and also called the hall several times a day to inquire about when the G.F.C. job would start. He was hazy about whom he talked with during these phone calls. I discredit his testimony. Woods, the Respondent's chief dispatcher, is normally in the hall until about 10 or 10:30 a.m. each day and leaves to visit jobsites after completing each day's dispatch. He testified truthfully that he did not see Henderson at the hall at anytime that week. Henderson admitted on the stand that he did not have a telephone during this period of time, although he claims he could have been reached by telephone.

Woods admits speaking by telephone with Henderson approximately Wednesday of the first week of the G.F.C. job and telling Henderson that not all men were being referred at the same time. Henderson started to work on the afternoon shift the following Monday. He is uncertain as to who told him to report at that time and does not remember whether he was told to report on the morning of the Monday he actually reported or whether he was given these instructions the preceding Friday. He worked 4 days. According to Henderson, he was laid off at the end of the fourth day because of a seniority practice of laying off first those individuals who reported to the job last and have the lowest job seniority.[10] When he came back to the hall, he complained that the job did not last 7 days and was not a regular job within the meaning of that term as it is used at the hall, so he was placed back on the out-of-work roster in his former slot rather than being dropped to the bottom of the list. Later, he was referred by the Respondent to a job at Children's Hospital for the Unlimited Construction Company. It was after being laid off of this job in October, under conditions which were disputed in the record, that Henderson filed the charge in this case.[11]

Shortly after the charge in this case was filed, Union Executive Board Member and Business Agent James H. Green spotted Henderson at the hall and asked him to come into an office to speak with him. Green questioned Henderson as to why the latter had filed a charge against the Union. Henderson said it was because he had been laid off at the Children's Hospital job. Green pursued the question, telling Henderson that if he had a complaint about the layoff at the hospital he should have filed the charge against the employer who laid him off, not against the Union. Green also told Henderson that the contractor had a right to lay him off if Henderson was not doing his work properly. Henderson asserts, and Green denies, that Green threatened to take Henderson's ''book.'' I credit Green's denial. Both agree that Green told Henderson that he had a right to file charges but that the Union had the right to file charges against him and that filing charges against the Union was not going to help Henderson get his job back at the hospital. Green also testified that he told Henderson that it was his personal opinion that Henderson was trying to overthrow the Union and that, if Henderson kept on, the Union would file charges against him.

In February 1993, Mayle had risen to the number three position on the out-of-work list and Henderson held the fourth position. On or about February 22, the dispatcher received a call for one laborer to work for Knowlton Construction Company at a jobsite on the Ohio State University campus. The job was a regular job and was still in progress at the time of the hearing in this case. Woods then proceeded to call the roll of the out-of-work list to obtain a referral. The first person to answer was David Raike, who was number eight on the list. Raike was referred to the Knowlton job at 6:45 a.m. Mayle[12] and six others above Raike on the list did not answer when their names were called. By this time the Union had installed a daily sign-in list in compliance with the Board's Order in *Laborers II*. None of the men listed above Raike on the out-of-work list had signed in during the morning of February 22 except for Henry Eley, the number one name on the list, but Eley did not sign in until 8:30 a.m.[13]

When he prepared the out-of-work list for the following week, Woods dropped Mayle, Henderson, Eley, and the others who were above Raike on the previous list to the bottom of the new list, where they occupied positions 252 thru 256. There is no contention that either Mayle, Henderson, or any other applicant had actually signed in at the hall in a timely fashion on the morning that Raike was referred to the Knowlton job. In fact, Mayle testified that he never signs in when he comes to the hall, notwithstanding the fact that the sign-in requirement was instituted by the Union to comply with the remedy required by the Board in a case in which Mayle was the charging party.

II. ANALYSIS AND CONCLUSIONS

Both the power of the Board to oversee the operation of union hiring halls and the limitations on that power were outlined years ago by the Supreme Court in *Teamsters Local 357 (California Trucking Assns.) v. NLRB*, 365 U.S. 667 (1961):

> Congress has not outlawed the hiring hall, though it has outlawed the closed shop except within the limits prescribed in the *provisos* to Section 8(a)(3). Senator Taft made clear his views that hiring halls are useful, that they are not illegal per se, that unions should be able to operate them so long as they are not used to create a closed shop:
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> . . . .
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> There being no express ban of hiring halls in any provisions of the Act, those who add one, whether it be

[10] The reason why Henderson was laid off at the G.F.C. job on the date in question was not corroborated in the record from any source.

[11] Henderson said that he was laid off as a result of a safety dispute with his employer, Unlimited Construction. Union Business Agent James H. Green was informed by the employer that Henderson was asked to work on a scaffolding and was either unable or unwilling to do so and was removed by the employer from the jobsite.

[12] I discredit Mayle's testimony and am not the first administrative law judge to do so. See *Laborers II*.

[13] The list indicates that Raike had signed in at 6:02 a.m.

the Board or the courts, engage in a legislative act. The Act deals with discrimination either by the employers or unions that encourages or discourages union membership. As respects Section 8(a)(3), we said in *Radio Officers v. Labor Board*, 347 U.S. 17, 42–43 [1954]:

> The language of Section 8(a)(3) is not ambiguous. The unfair labor practice is for an employer to encourage or discourage membership by means of discrimination. Thus, this section does not outlaw all encouragement or discouragement of membership in labor organizations; only such as is accomplished by discrimination is prohibited. Nor does this section outlaw discrimination in employment as such; only such discrimination as encourages or discourages membership in a labor organization is proscribed.

It is the ''true purpose'' or ''real motive'' in hiring or firing that constitutes the test. Some conduct may by its very nature contain the implications of the required intent; the natural foreseeable consequences of certain actions may warrant the inference.

. . . .

It may be that the very existence of the hiring hall encourages union membership. We may assume that it does. The very existence of the union has the same influence. When a union engages in collective bargaining and obtains increased wages and improved working conditions, its prestige doubtless rises and, one may assume, more workers are drawn to it. When a union negotiates collective bargaining agreements that include arbitration clauses and supervises the functioning of those provisions so as to get equitable adjustments of grievances, union membership may also be encouraged. The truth is that the union is a service agency that probably encourages membership whenever it does its job well. But as we said in *Radio Officers v. Labor Board*, supra, the only encouragement or discouragement of union membership banned by the Act is that which is ''accomplished by discrimination.''

. . . .

It may be that hiring halls need more regulation than the Act presently affords. As we have seen, the Act aims at every practice, act, source, or institution which in fact is used to encourage and discourage union membership by discrimination in regard to hire or tenure, term or condition of employment. Perhaps the conditions which the Board attaches to hiring hall arrangements will in time appeal to the Congress. Yet where Congress has adopted a selective system for dealing with evils, the Board is confined to that system. [Citation omitted.] Where, as here, Congress has aimed its sanctions only at specific discriminatory practices, the Board cannot go farther and establish a broader, more pervasive regulatory scheme.

. . . .

If hiring halls are to be subjected to regulation that is less selective and more pervasive, Congress not the Board is the agency to do it.

Notwithstanding these limitations, the Board has forged ahead over the years to develop a common law of hiring hall violations which, at least in some instances, lifts from the shoulders of the General Counsel the onerous burden of proving specific discriminations linked to union membership or lack thereof. A departure from established hiring hall rules has been deemed to be not only a violation of the contract but of the Act, as well, unless the union proves that its contract with employers requires the departure or the departure is necessary for the effective functioning of the hall. The failure to maintain an out-of-work list has been deemed to be a per se violation of the Act, as is the case with a refusal to let members see out-of-work lists. An unwritten practice of allowing employers to recall employees who have previously worked for them without regard to their standing on the out-of-work list has also been deemed to violate the Act. However, in *Laborers I*, the Board specifically refused to hold that requiring an applicant to be personally present in a hiring hall when his name is called for a job is a per se discrimination based on union membership or lack thereof. It follows from that premise that a penalty or consequence which attaches to the failure of an applicant to be personally present in a hiring hall when his name is called, such as being dropped to the bottom of the list, is likewise not a violation of the Act, since such a consequence is neither vague nor subjective. Under the practice of the Respondent in this case, an individual who does not respond to a call for a regular job (7 days' duration or more) is dropped to the bottom of the list. I have found as a fact that this practice existed at all times material herein and that it was invoked on or about February 22, 1993, in a lawful and evenhanded manner. Specifically, it was invoked not only with reference to Mayle and Henderson but also with reference to other applicants toward whom there is no evidence of animus on the part of this Respondent. Accordingly, so much of the consolidated complaint which alleges that Mayle and others were discriminated against when, having failed to respond to a call to go to the Knowles job at Ohio State University, they were dropped to the bottom of the list should be dismissed.

There is no reason to believe that the Respondent was guilty of any per se violation of the Act in referring applicants to the G.F.C. job in July 1992. It was free to call on casuals in the hiring hall to respond to a request for laborers when applicants whose names were on the out-of-work list failed to do so. There is no evidence that the selection of casuals instead of persons on the list in any way promoted or discouraged the union membership of anyone. The Union has had no practice of referring individuals by telephone or of going out of its way to contact applicants who were not present for referral just because they had signed up for jobs. Accordingly, the fact that those who ultimately found their way onto the G.F.C. payroll had rankings throughout all parts of the out-of-work list, or that many had no ranking at all, simply attests to the diligence of those individuals in making themselves available for work while others did not. We have no way of knowing from the record how many, if any, of those who were actually referred were or were not union members, how many of those who were called rejected the opportunity to work at a particularly onerous and demanding job, or how many in the upper portions of the out-of-work list were assigned to other jobs during the same week. Accordingly, there is no basis for inferring that the Respondent violated the Act when proof of specific discriminations is nonexistent and when no one, other than Hender-

son, complained that he had been treated unfairly or unlawfully. Indeed, Henderson has leveled no claim of discrimination based on the content of the list of applicants who were referred for drug screening. Having passed the screening test, he was eligible for employment and was in fact hired. His complaint is that he was not put to work soon enough.

It is suspicious that Henderson, a political antagonist of the current administration of the Respondent, was second to last to be hired by G.F.C. from the list of drug-free eligibles. However, the employer told the Union that it did not want all of the men who passed its physical examination to be referred at the same time and that it would be in contact with the Union to schedule reporting dates. Not everyone reported on July 13. There is no reliable evidence as to how or when Henderson actually got the word to report when he did. Indeed, the evidence is skimpy as to how others who had passed the drug test were told to report. Accordingly, we are left to speculate as to whether Henderson's late reporting was the product of intentional footdragging on the part of Union officials growing out of personal animus or whether he was simply neglectful in not showing up for actual referral with the same diligence that others did.[14] The burden of proof to explain this situation does not devolve upon the Respondent but lies with the General Counsel to establish unlawful conduct by something more substantial than suspicion. Accordingly, I will recommend that so much of the consolidated complaint which alleges that the Union violated the Act by its referrals to the G.F.C. job be dismissed.

Some months after Henderson left the G.F.C. job and after he had been laid off from a subsequent job, he filed a charge with the Board and was questioned about it by Green. I have discredited Henderson's testimony to the effect that Green specifically threatened Henderson to ''get his book,'' i.e., terminate his membership in Local 423. However, Green's own testimony discloses that, during the conversation in question, he told Henderson that the Union, as well as Henderson, had the right to file charges. Green accused Henderson of trying to overthrow the Union and threatened to file charges against him. Such internal union charges could, under some circumstances, result in expulsion from membership. While the nature of Green's threat was vague and lacked a certain specificity, it is clear that it was in fact made and that it was made in response to Henderson's action in seeking redress from the Board. Accordingly, by threatening Henderson with unspecified reprisal because he had filed charges under the Act, the Respondent herein violated Section 8(b)(1)(A) of the Act. I so find and conclude.

CONCLUSIONS OF LAW

1. G.F.C., Inc. and the Altman Company, and each of them, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and maintains a contractual relationship, either directly or through a multiemployer association, with the Respondent providing for an exclusive hiring hall referral system.

2. Respondent Laborers' International Union of North America, Local 423, AFL–CIO is a labor organization within the meaning of the Act.

3. By making unspecified threats of reprisal against members and applicants for referral because they have filed charges or given testimony under the Act, the Respondent herein violated Section 8(b)(1)(A) of the Act. Such unfair labor practices have a close, intimate, and substantial effect on the free flow of commerce within the meaning of Section 2(2), (6), and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I will recommend that it be required to cease and desist therefrom and to take certain affirmative action designed to effectuate the purposes and policies of the Act. I will require it to post the usual notice advising its members of their rights and of the results in this case.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[15]

ORDER

The Respondent, Laborers' International Union of North America, Local 423, AFL–CIO, Columbus, Ohio, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Threatening members or applicants for referral with reprisal because they have filed charges or given testimony under the Act.

(b) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Post at its Columbus, Ohio hiring hall, copies of the attached notice marked ''Appendix.''[16] Copies of the notice, on forms provided by the Regional Director for Region 9, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to members are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(b) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER RECOMMENDED that insofar as the consolidated complaint herein alleges matters which have not been found to have been violations of the Act, the consolidated complaint is dismissed.

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[14] Moreover, we have only Henderson's word that he was laid off first in order of seniority as the last man hired. I decline to predicate a finding on this aspect of his testimony as well.

[15] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[16] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Laborers' International Union of North America, Local 423, AFL–CIO, is posting this notice to comply with an order of the National Labor Relations Board, which was issued after a hearing in this case in which we were found to have violated certain provisions of the National Labor Relations Act.

WE WILL NOT threaten members or applicants for referral with reprisal because they have filed charges or given testimony under the National Labor Relations Act.

WE WILL NOT in any like or related matter coerce or restrain employees in the exercise of rights guaranteed to them by Section 7 of the Act.

LABORERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 423, AFL–CIO